[ORAL ARGUMENT NOT YET SCHEDULED]

No. 18-5276

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JASON LEOPOLD AND
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:13-mc-00712 (Howell, C.J.)

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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GLOSSARY

PR/TT	Pen Register and/or Trap and Trace
SCA	Stored Communications Act, 18 U.S.C. §§ 2701-2712
USAO	U.S. Attorney's Office for the District of Columbia

SUMMARY OF ARGUMENT

This appeal presents issues of first impression in this Circuit: Whether, under either the First Amendment or common law, the public has a qualified right to inspect judicial records, including docket sheets, in any of three types of matters filed in the U.S. District Court for the District of Columbia. Specifically, Petitioners challenge the District Court's rulings rejecting the existence of a constitutional or common law presumption of access, post-investigation, to docket sheets and judicial records filed in connection with government applications for (1) warrants under the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2712; (2) court orders under 18 U.S.C. §2703(d) of the SCA ("Section 2703(d)"); and (3) court orders authorizing the use of a pen register and/or trap and trace ("PR/TT") device pursuant to the Pen Register Act, 18 U.S.C. §§ 3121-3127. Reviewing the District Court's rulings de novo, this Court should reverse for the following reasons.

First, it is indisputable that documents filed in these matters are "judicial records" to which the common law's "strong presumption in favor of public access" applies. *United States v. Hubbard*, 650 F.2d 293, 316-17 (D.C. Cir. 1980). Thus, the District Court's holding that the common law affords the public no right to inspect the types of judicial records at issue post-investigation, and affords only a narrow right of access to certain limited information about these matters on a

periodic basis, should be reversed. Because the District Court erroneously interpreted *Hubbard* to permit it to consider "administrative burden" as dispositive when concluding "that no asserted common law right of access exists," JA961, this Court should also clarify the correct interpretation of *Hubbard*.

Second, the First Amendment right of access also applies to judicial records filed in these matters post-investigation. Under this Circuit's precedent, both the "experience" and "logic" prongs of the two-part test established by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*") are satisfied.

Third, both the First Amendment and common law rights of access apply to docket sheets in these matters.

The Government's Brief misstates the District Court's rulings, the issues presented on appeal, and the standard of review applicable both to the District Court's rejection of a common law right of access to judicial records filed in these matters and its misinterpretation of *Hubbard*. The Government cites inapplicable case law decided under, for example, the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and fails to address much of the legal authority presented in Petitioners' Brief. Its primary contention—that the challenged rulings should be affirmed because Petitioners "have received a substantial portion of the relief they sought," Gov. Br. 2—is both factually incorrect and legally baseless.

For the reasons set forth in Petitioners' Brief and herein, the Court should reverse the judgment below, hold that the First Amendment and common law presumptions of access apply to judicial records filed in SCA warrant, Section 2703(d), and PR/TT matters, and associated docket sheets, and remand to the District Court with instructions to evaluate Petitioners' proposed relief pursuant to the correct legal standards.

ARGUMENT

I. The Government Misstates the District Court's Rulings, the Issues Presented, and the Applicable Standard of Review.

The District Court held that the public has no First Amendment right of access to judicial records, including docket sheets, in SCA warrant, PR/TT, or Section 2703(d) matters after their related investigations end (*i.e.*, post-investigation). JA886-96. The District Court also held that "no common law right of access" to these judicial records "exists" post-investigation. JA961. Erroneously interpreting *Hubbard* as standing for the proposition "that no asserted common law right of access exists in the first place where recognizing such right of access would impose undue administrative burdens," *id.*, the District Court held that the common law affords the public a right only to certain limited information about future-filed matters in the form of "periodic" reports generated by the Clerk's Office. JA924, 954; *see also* JA927-28 (District Court describing its rulings as "declin[ing] to recognize a broader [prospective] or retrospective right of

access under the common law or to recognize any right of access under the First Amendment to these routinely sealed records"). These legal conclusions are the issues before the Court. *See* Pet'rs' Br. 1-2. The Government's brief misstates these rulings, the issues presented, and the applicable standard of review.

First, as to the District Court's holding that the public has no constitutional right to inspect judicial records filed in these matters *post-investigation*, the Government incorrectly asserts that the question presented is whether the public has "a First Amendment right of access" to such records "in connection with *active criminal investigations*." Gov. Br. xii (emphasis added).

Petitioners argued below that the public has a constitutional right to inspect judicial records filed in these matters *after any related criminal investigations end*. JA846-53. The only aspect of the relief sought by Petitioners not *expressly* limited to the post-investigation context was their request for contemporaneous ("real-time") access to dockets in future SCA warrant, PR/TT, and Section 2703(d) matters. JA846, 849, 851. The District Court—finding that proposed relief inconsistent with Petitioners' focus on access post-investigation—concluded that Petitioners were foreclosed from seeking "real-time" public docketing.[1] JA950. It

[1] Petitioners disagree that their request for contemporaneous public access to dockets "represent[ed] a significant shift in [their] position," JA920, and that such access would necessarily jeopardize "ongoing" investigations, JA952. At least one district, the Eastern District of Virginia, provides real-time public access to dockets in such matters without, as the District Court acknowledged, any negative

went on to reject the existence of any constitutional or common law right to inspect docket sheets in such matters, including post-investigation. *Id*. The Government's claim that the District Court rejected a constitutional right of access to "documents filed . . . in connection with active criminal investigations," Gov. Br. xii, is thus belied by the record and a plain reading of the District Court's opinions.

Second, as to the District Court's holding that there is "no [] common law right of access" to judicial records filed in these matters post-investigation, JA961, and its conclusion, based on an erroneous reading of *Hubbard*, that the common law provides a presumption of access only to certain narrow categories of information about such matters on a periodic basis, JA956, the Government inaccurately recasts the issue before the Court and misstates the applicable standard of review. *See* Gov. Br. xii (stating that the issue presented is whether the District Court "abused its discretion in ruling that there is only a limited common law right of access" to these judicial records).

Whether the public has a common law right of access to applications, orders, and other judicial records, including docket sheets, in these matters post-investigation is a question of law for this Court to decide de novo. *United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997). Whether the District Court

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consequences. JA864; *see also* Br. of Former United States Magistrate Judges as *Amici Curiae* Supporting Appellants 8-11 ("Br. of *Amici* Magistrate Judges").

erroneously interpreted this Court's decision in *Hubbard* is likewise subject to de novo review. *Fed. Trade Comm'n v. Church & Dwight Co.*, 665 F.3d 1312, 1315 (D.C. Cir. 2011). Though the Government acknowledges that legal questions are reviewed de novo, *see* Gov. Br. 33, it incorrectly asserts that the Court should review the District Court's holdings as to the existence of a common law right of access for abuse of discretion. *See* Gov. Br. 48-56.[2] This Court's precedent, however, is clear. Where the Court's "review is directed . . . to the question of whether a right of access (under the First Amendment or at common law) *exists at all*" its review is "de novo." *El-Sayegh*, 131 F.3d at 160 (emphasis added); *see also MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 666 (D.C. Cir. 2017) ("*MetLife*").

Finally, the Government ignores the *actual* proposed relief sought by Petitioners, JA845. During the course of the proceedings below, Petitioners narrowed the scope of their petitions to seek primarily *prospective* relief to assure access to *future-filed* SCA warrant, PR/TT, and Section 2703(d) materials. JA846, 849, 851. Thus, contrary to the misunderstanding of the Government, which devotes nearly ten pages of its brief to discussing efforts to address nearly a decade

[2] Petitioners' position as to the applicable standard of review is clear. *See* Pet'rs' Br. 4. The Government's assertion that "Appellants claim" that "the district court abused its discretion" in rejecting a common law right of access is incorrect. Gov. Br. 48.

of sealed matters—not through unsealing, but through the release of lists of docket information about them, JA896-97—Petitioners did not ask the District Court to order "broad, retrospective unsealing[.]" Gov. Br. 6; *compare* Gov. Br. 13-22 *with* JA856; *see also* JA898 (noting Petitioners do not "seek retrospectively the full unsealing, with redactions, of such materials"). The Government's repeated mischaracterization of Petitioners' proposed relief as a "broad and unprecedented unsealing request," Gov. Br. 47, is a red herring.

II. The Common Law Right of Access Applies to Judicial Records Filed in SCA Warrant, PR/TT, and Section 2703(d) Matters Post-Investigation.

The District Court's determination that the public has no common law right to inspect these judicial records post-investigation is an error of law that requires reversal. The Government offers no argument to the contrary. *See* Gov. Br. 48-56. Nor could it. The common law's "strong presumption in favor of public access," *Hubbard*, 650 F.2d at 317, applies to *all* "judicial records," *MetLife*, 865 F.3d at 665. And there is no dispute that applications, orders, and other documents filed in these matters are "judicial records." *See* Pet'rs' Br. 43-46; *see also* JA886.

The District Court's categorical denial of the existence of any common law right to inspect the judicial records at issue post-investigation, and its decision to recognize only a narrow common law right of access to certain information in "periodic" reports, JA961, contravenes clear precedent. *See MetLife*, 865 F.3d at 666. Indeed, as explained in Petitioners' Brief, and not addressed by the

Government, the District Court's rulings are irreconcilable with the very nature of the common law right "*to inspect and copy* public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978) (emphasis added); *see also* Pet'rs' Br. 41-42.

It is also irreconcilable with a recent ruling from the District Court itself ordering the unsealing of SCA warrant materials, redacted to protect ongoing investigations, pursuant to the common law right of access. *In re Appl. for Access to Certain Sealed Warrant Materials*, No. 1:19-mc-44-BAH, at 5-6 (D.D.C. May 21, 2019). In addition to the unsealing of the redacted SCA warrant materials at issue in that case—which was unopposed by the Government, *id*. at 1—the District Court also imposed "a 'sunlight date' . . . at which time sealed portions of the" SCA warrant materials at issue will become public "'absent a showing . . . that continued sealing is justified.'" *Id*. at 6-7 (citation omitted). This latter relief ordered by the District Court largely mirrors the prospective relief sought by Petitioners below. JA845-53.

Finally, the conclusion that there is no common law right to inspect judicial records filed in Section 2703(d) matters is squarely at odds with the Fourth Circuit's decision in *In re Appl. of United States for an Order Pursuant to 18 U.S.C. Section 2703(D),* 707 F.3d 283, 291 (4th Cir. 2013) ("*Appelbaum*"). While the Government claims that Petitioners "do not cite a single case" holding that the

common law right of access applies to the materials at issue, Gov. Br. 5, it ignores the Fourth Circuit's express recognition that the common law right applies to judicial records filed in Section 2703(d) matters, even if it is overcome while an investigation is active. *Appelbaum,* 707 F.3d at 291. Though the Government cites *Appelbaum* repeatedly, Gov. Br. 5, 9, 21, 26, 35, 36, 43-44, and 48, it makes no attempt to address—let alone distinguish—this holding.

III. The Court Should Clarify the Correct Interpretation of *Hubbard*.

In determining "whether a document must be disclosed pursuant to the common law right of access," the court must first determine whether the document is a "judicial record" to which the right attaches. *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 902 (D.C. Cir. 1996). If it is, the court should then "proceed to balance the government's interest in keeping the document secret against the public's interest in disclosure." *Id*. *Hubbard* sets forth a six-factor test to balance the interests presented by a given case. *Hubbard*, 650 F.2d at 317-22.

The District Court improperly conflated the separate steps of this "two-step" inquiry, erroneously interpreting *Hubbard* as permitting it to consider "administrative burden" as dispositive "in deciding whether to recognize any right of access in the first place, not that such a right of access exists but nonetheless gives way to countervailing interests." JA961. However, because they are "judicial records," applications, orders, and other documents filed in SCA warrant,

PR/TT, and Section 2703(d) matters necessarily satisfy the crucial first step. *Wash. Legal Found.*, 89 F.3d at 902. They are indisputably documents to which the common law right of access applies. By rejecting a "broader" common law right to inspect these judicial records, JA927, the District Court committed legal error. The Government makes no attempt to address this aspect of the District Court's rulings; it argues only that "administrative burden" is an appropriate factor for courts to consider under *Hubbard*. *See* Gov. Br. 51-53.

Contrary to the Government's argument, the District Court further misinterpreted the six-factor *Hubbard* test by concluding that "administrative burden" is a "particularized privacy or other interest[] that" may, alone, overcome the public's common law right of access. Pet'rs' Br 51-54; *see also* Gov. Br. 50-51. *Hubbard* does not contemplate consideration of "administrative burden." And, even if it was a proper consideration under *Hubbard*, given the District Court's findings that the enumerated *Hubbard* factors weigh *in favor* of access, it would be an abuse of discretion for the District Court to conclude that "administrative burden" alone outweighs the presumption of access. *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). Accordingly, the Court should clarify the proper application of *Hubbard* to be applied on remand.

A. *Hubbard* Does Not Contemplate Administrative Burden as a Factor Overcoming the Presumption of Access.

The District Court erred as a matter of law by construing *Hubbard* as allowing it to consider administrative burden—a factor neither asserted by the Government below, nor mentioned in *Hubbard*.[3] JA880.

Contrary to the Government's assertion that *Hubbard* did not "defin[e] or limit[] in any way the 'particularized . . . other interests' a court may consider," Gov. Br. 51 (quoting *Hubbard*, 650 F.2d at 323), *Hubbard* makes clear that to the extent a court may consider "particularized privacy or other interests" beyond the six factors enumerated by the Court, those interests "must be assessed with specific reference to the documents' contents." *Hubbard*, 650 F.2d at 323 n.116. Though the Government reorders the relevant language in *Hubbard*, Gov. Br. 54, a plain reading of that decision belies the argument that *Hubbard* contemplates consideration of "administrative burden," a factor unconnected to the contents of any specific judicial record. *Hubbard*, 650 F.2d at 323 n.116.

The Government gives scant attention to cases in which Courts have addressed systemic deprivations of the public's rights of access to judicial records

[3] The Government did not argue below that the common law right of access to these judicial records is outweighed by considerations of administrative burden. Pet'rs' Br. 55. Accordingly, administrative burden is not a reason that "defendants [] assert[ed]" as a basis for sealing. *Hubbard*, 650 F.2d at 232.

notwithstanding the administrative burdens associated with doing so. *See, e.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86, 102 (2d Cir. 2004) (recognizing right of public access to judicial records in "what appeared to be thousands of [sealed] cases" spanning 38 years). And neither of the cases cited by the Government for the proposition that "administrative burden" is an interest sufficient to overcome the common law presumption of access supports that argument. Gov. Br. 51-52 (citing *In re Sealed Case*, 199 F.3d 522 (D.C. Cir. 2000) and *In Granick*, 2018 WL 7569335 (N.D. Ca. Dec. 18, 2018); *adopted by In re Granick*, 4:16-mc-80206-PJH (N.D. Ca. May 20, 2019)). This Court's decision in *In re Sealed Case*, which was expressly limited to the "unique" context of grand jury proceedings, is inapposite. 199 F.3d at 525; *see also infra* pp. 22-23. The magistrate judge's report and recommendation from *In re Granick* is not binding on this Court and lacks persuasive value; the magistrate judge's recommendation vis-à-vis "administrative burden" relies *entirely* on the District Court rulings challenged here. *In re Granick*, 2018 WL 7569335, at *12-14.

Were this Court to sanction the denial of public access to entire categories of judicial records based solely upon the fact that providing access entails administrative burden, it would swallow the common law right whole and allow systemic denials of access to continue in perpetuity. The Court should thus clarify that administrative burden is not a countervailing factor under *Hubbard*.

B. Even if *Hubbard* Permits Consideration of Administrative Burden it is Not a Dispositive Factor.

The Government's contention that the District Court "expressly weighed each of the *Hubbard* factors" and "did not treat any factor as dispositive," Gov. Br. 53-54, is belied by the record. Though it limited its prospective-relief analysis to the scope of the narrow common law right of access it recognized, JA905, the District Court expressly held that each of "*Hubbard*'s generalized factors weigh favorably toward retrospective access" to "extracted" docket information "for essentially the same reasons . . . ." JA905-07. Administrative burden is the sole factor the District Court found weighed against access. *Id*. Given these findings, even if administrative burden is an appropriate factor to consider under *Hubbard*—which it is not—it would be an abuse of discretion for the District Court to conclude on remand that administrative burden singly outweighs the presumption of access to judicial records filed in these matters. *See Nat'l Children's Ctr.*, 98 F.3d at 1410 (district court abused its discretion in sealing judicial record where "there are several factors in favor of not sealing" and "only one *Hubbard* factor counsels in favor of sealing").[4]

[4] Any conclusion that the common law right of access is overcome must be supported by specific, on-the-record factual findings demonstrating that the interest in access is outweighed by countervailing interests. *Hubbard*, 650 F.2d at 317. Contrary to the Government's contention that the District Court "identified, in great detail," findings that support such a conclusion here, Gov. Br. 54, the District

IV. The First Amendment Right of Access Applies to Judicial Records in SCA Warrant, PR/TT, and Section 2703(d) Matters Post-Investigation.

A. The Government Urges an Incorrect Application of the "Experience and Logic" Test that is Directly at Odds with Precedent of this Court and the Supreme Court.

In first articulating the principles of "experience" and "logic," Justice Brennan instructed courts, when determining the right of access as to a particular proceeding, to "consult historical and current practice" and "weigh the importance of public access." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring). Justice Brennan explained that while "an enduring and vital tradition" of public access "has [a] special force" and "implies the favorable judgment of experience," the value of public access to any particular proceeding "must be measured in specifics." *Id.* In adopting this approach in *Press Enterprise II*, the Supreme Court made clear that "experience" and "logic" are "complementary" and "related" considerations. *Press Enterprise II*, 478 U.S. at 8-9; *see also id*. at 10 n.3 (noting that some courts have recognized a constitutional right to pretrial proceedings given their "importance[,]" even though they had "no historical counterpart").

This Court has similarly made clear that in evaluating the "experience" prong of the *Press-Enterprise II* test, the proper inquiry "is a functional rather than

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Court provided only a cursory discussion of Petitioners' proposed prospective relief, dismissing it as "unworkable" without further explanation. JA962-64.

classificational one" that looks to "whether information *of the sort at issue here*—regardless of its prior or current classification as court records—was traditionally open to public scrutiny." *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1337 (D.C. Cir. 1985) ("*In re Reporters Committee*") (emphasis original). Accordingly, lack of a historical tradition of access "by itself is of course not dispositive," and a "new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure." *El-Sayegh*, 131 F.3d at 161 (citation omitted); *see also Wash. Post v. Robinson*, 935 F.2d 282, 290 (D.C. Cir. 1991).[5]

The Government ignores this precedent. It urges the Court to apply a cramped interpretation of the "experience and logic" analysis that eschews "logic" and treats "experience" not as a "functional" inquiry into "whether information *of*

[5] The Government relegates its discussion of *El-Sayegh* to a footnote in which it contends the decision "actually supports the government's position" because the Court found "*no* public right of access to a proposed plea agreement provided to the district court . . . where that plea agreement was not consummated." Gov. Br. 36 n.12 (emphasis original). The Government misses the point. The Court in *El-Sayegh* indeed concluded that "a plea agreement submitted to the court before the plea is offered, solely for the purpose of allowing the court to rule on a government motion to seal the agreement," that was ultimately withdrawn, is not a "judicial record" to which either the First Amendment or common law right of access applies. *El-Sayegh*, 131 F.3d at 159. Yet the unconsummated plea agreement at issue, which "played no role in any adjudicatory function," *id*. at 163, bears no resemblance to court orders and other documents filed in the matters at issue here—documents the Government concedes are "judicial records." Pet'rs' Br. 43-46.

the sort at issue here" has been "traditionally open to public scrutiny," *In re Reporters Committee*, 773 F.2d at 1337 (emphasis original), but rather as a classificational determination to be made solely on the basis of default sealing practices.[6] Under this Court's precedent, the public has a First Amendment right of access to the judicial records at issue post-investigation.

B. The Tradition of Access to Warrant Materials Post-Investigation is Applicable to SCA Warrants.

SCA warrants have an obvious historical counterpart in traditional search warrants. Indeed, the Government does not dispute that an SCA warrant is a "newer procedure that 'substitute[s] for an older one'—namely, a traditional warrant—in a 'new' technological context." Pet'rs' Br. 26 (quoting *El-Sayegh*, 131 F.3d at 161). Instead, the Government argues that "an SCA warrant, though a 'warrant' in name, is more analogous to a subpoena than to a traditional search warrant," Gov. Br. 37, pointing to the same handful of procedural features—including the method of its execution—cited by the District Court below. JA935-

[6] The Government suggests that merely by accurately describing the effect of these practices, Petitioners have "acknowledge[d]" that there is no "unbroken, uncontradicted history" of openness to judicial records in these matters post-investigation and, thus, that the "experience" prong cannot be satisfied. Gov. Br. 25, 34-35 (internal quotation omitted). This misstates Petitioners' arguments and misapprehends the nature of the "experience" inquiry, as stated above. Moreover, indefinite sealing in these matters is not the result of statutory mandate, Congressional intent, or the "favorable judgment of experience," *Press-Enterprise II*, 478 U.S. at 8-9; it is the result of default sealing practices that have gone unexamined. *See* Pet'rs' Br. 38.

36. Yet as discussed in Petitioners' Brief, these factors have no bearing on "whether information *of the sort at issue here*" has been "traditionally open to public scrutiny." *In re Reporters Committee*, 773 F.2d at 1337 (emphasis original).

This Court's decision in *El-Sayegh* is instructive. In distinguishing its earlier decision in *Robinson*, 935 F.2d at 290, the Court in *El-Sayegh* explained that a plea agreement "accepted by the court, and on which a guilty plea is entered, substitutes for the entire trial. . . . [T]hus it makes sense to treat a completed plea agreement as equivalent to a trial, and therefore as an item that has 'historically been made available.'" *El Sayegh*, 131 F.3d at 160-61. An SCA warrant is similarly equivalent to a traditional warrant. It authorizes government agents, on a showing of probable cause, to search and seize the contents of a person's e-mail communications. It thus serves the same purpose as a traditional warrant, but in "a new technological context" in which a person's "papers" include—and now may consist entirely of—e-mail and other electronic communications. Pet'rs' Br. 26. It accordingly "makes sense to treat" SCA warrants "as an item that has 'historically been made available.'" *El Sayegh*, 131 F.3d at 160-61.

The plain language of the SCA and its legislative history support this conclusion. Pet'rs' Br. 27-28. Though the Government argues that "[n]othing in the SCA's text, structure, or legislative history suggests a congressional design to incorporate into the SCA any First Amendment right of access to records related to

an SCA warrant," Gov. Br. 39, its reasoning is backwards.[7] Statutes must conform to constitutional requirements. The First Amendment right of access to civil and criminal judgments "could hardly be defeated, for example, by a state statute providing that henceforth such judgments will not become part of court records." *In re Reporters Committee*, 773 F.2d at 1337. Yet, even in the context of the common law right—which unlike the constitutional right "must yield to a statute 'when Congress has spoken directly to the issue at hand'"—the SCA "is not such a statute." *MetLife*, 865 F.3d at 669 (citation omitted).

The SCA provides "no default sealing or nondisclosure provisions[.]" JA887. Congress is assumed to be familiar with the public's common law and constitutional rights of access to judicial records, including the First Amendment presumption in favor of access to search warrant materials post-investigation. *MetLife*, 865 F.3d at 669. We can "reasonably assume that Congress would not have overturned the longstanding [common law] presumption favoring judicial transparency" *sub silentio*. *Id*. (finding "nothing in the language of [the relevant statute] to suggest that Congress intended to displace" the common law right of

[7] The Government inexplicably cites a FOIA decision in support of this assertion. Gov. Br. 39 (quoting *Ctr. for Nat'l Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003)). The Court in that case held the First Amendment right of access did not apply to the "non-judicial documents" sought by the petitioners under FOIA; the case has no applicability here.

access). We can also assume that Congress's deliberate use of the term "warrant" in the SCA reflected an expectation that the First Amendment right of access to executed warrant materials would apply. *See, e.g.*, *id.*; *Lamie v. U.S. Tr.,* 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its term." (citations omitted)).

The Government urges the Court to ignore the language of the SCA and its legislative history, which supports an interpretation of the term "warrant" consistent with its ordinary meaning. Pet'rs'. Br. 27-28; *see also* Br. of First and Fourth Amendment Scholars as *Amici Curiae* Supporting Appellants 9-10. First, the Government claims on the basis of inapposite, misquoted authority that the "substance of the government's powers"[8] under the SCA is more important than "terminology." Gov. Br. 38. Yet, even assuming this was the correct standard, which it is not, the "substance" of the powers exercised by the Government pursuant to the SCA mirror those exercised pursuant to traditional search warrants, as the SCA's legislative history underscores.

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[8] The Government purports to quote *Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 715 F.3d 631, 646 (7th Cir. 2013) for the proposition that the "First Amendment analysis looks to the substance of the government's powers rather than how an Act nominally refers to those powers." Gov. Br. 38. However, the opinion in *Big Ridge* makes no mention of the First Amendment. The Government replaced "Fourth Amendment" with "First Amendment" in its parenthetical. *See Big Ridge*, 715 F.3d at 646.

Because an SCA warrant permits the government to seize the contents of personal messages, and thus implicates Fourth Amendment protections, Congress "required the government to obtain a search warrant." H.R. Rep. No. 99-647, at 68 (1986). The Government's claim that "[t]he Fourth Amendment is implicated in many encounters between citizens and the government that do not involve warrants at all," Gov. Br. 42, is irrelevant. Further, that the CLOUD Act "expand[ed] the extra-territorial reach of SCA warrants," Gov. Br. 40, supports Petitioner's position that Congress understands "warrant" in the SCA to mean "warrant."[9] If an SCA warrant is merely a subpoena—presumed to apply to information abroad—the CLOUD Act would have been superfluous. Pet'rs' Br. 28.

The tradition of public access to search warrant materials post-investigation applies with full force to SCA warrant materials. Because judicial records of this kind have been "traditionally open to public scrutiny," *In re Reporters Committee*, 773 F.2d at 1337, the "experience" prong is satisfied.

[9] The Government's reliance on *United States v. Ackies*, 918 F.3d 190, 201-02 (1st Cir. 2019) is misplaced. Gov. Br. 40. There, the First Circuit affirmed the denial of a motion to suppress evidence obtained via SCA warrants, concluding that use of the word "procedures" in 18 U.S.C. § 2703(a) indicated the geographical limitations of Rule 41(b) did not apply and, even if they did, the good faith exception was applicable. *Ackies*, 918 F.3d at 201. The First Circuit did not find that SCA warrants were subpoenas; the word "subpoena" appears nowhere in the decision.

C. The Tradition of Access to Warrant Materials Post-Investigation is Also Applicable to PR/TT and Section 2703(d) Materials.

The same tradition of access to warrant materials post-investigation also applies to PR/TT and Section 2703(d) materials. Though the Government asserts that Section 2703(d) and PR/TT orders are "even more unlike traditional search warrants than SCA warrants," Gov. Br. 43, it makes no attempt to address, let alone rebut, Petitioners' argument that Section 2703(d) and PR/TT orders function like SCA and traditional warrants because they authorize the government to seize private electronic communications records. Pet'rs' Br. 34-35. Indeed, the Supreme Court "has never held that the Government may *subpoena* third parties for records in which the suspect has a reasonable expectation of privacy." *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018) (emphasis added).

The Government's attempt to distinguish *Carpenter* as "involv[ing] a different circumstance" misses the mark. Gov. Br. 45. Though *Carpenter* concerned the acquisition of cell-site location records and, thus, specifically considered the "expectation of privacy in [one's] physical location and movements," *Carpenter*, 138 S. Ct. at 2221, the Supreme Court's holding underscores why—for purposes of the "experience" prong of *Press-Enterprise II*—Section 2703(d) and PR/TT materials, which concern the judicially-authorized use of law enforcement tools implicating significant privacy interests, are functionally equivalent to warrant materials.

D. *Appelbaum* is Distinguishable; None of the Judicial Records at Issue are "Akin to Grand Jury Materials."

According to the Government, even though "the petitioners" in *Appelbaum* "did not contest the experience prong of the 'experience and logic' test," the Fourth Circuit's brief discussion of it in a footnote should nonetheless be treated as persuasive. Gov. Br. 44 n.17. For the reasons set forth in Petitioners' Brief, however, the Fourth Circuit's First Amendment analysis provides little guidance here. Pet'rs' Br. 36.

Unlike this case, which involves access to judicial records post-investigation, the Fourth Circuit considered application of the constitutional right of access to Section 2703(d) materials only at the "pre-grand jury phase of an ongoing criminal investigation." *Appelbaum*, 707 F.3d at 286, 292. Indeed, because the investigation was active, the Fourth Circuit compared the Section 2703(d) materials at issue to "*unexecuted* search warrants." *Id.* at 292 n.9 (emphasis added). Section 2703(d) materials—as well as SCA warrant and PR/TT materials—*post-investigation*, on the other hand, are equivalent to *executed* search warrants, to which the First Amendment right of access applies.

The Government attempts to make too much of the Fourth Circuit's likening of Section 2703(d) materials at the "pre-grand jury phase of an ongoing criminal investigation" to "grand jury materials." *Appelbaum*, 707 F.3d at 286, 292; *see, e.g.*, Gov. Br. 5, 36 n.13, 53. *Appelbaum* makes clear that to the extent Section

2703(d) materials are akin to grand jury materials, that is true only in the context of an ongoing investigation. *See Appelbaum*, 707 F.3d at 293. Indeed, the Government makes no attempt to reconcile its application of *Appelbaum*'s First Amendment analysis to *post-investigation* Section 2703(d) materials with the Fourth Circuit's holding that the common law presumption of access applies and that the public is thus "not forever barred from access." *Id*. at 286, 295.

The Government's grand jury analogy is inapt in any event. Rooted in centuries of American history, grand jury proceedings are afforded a singular level of secrecy. *See Douglas Oil Co. of Calif. v. Petrol Stops Northwest*, 441 U.S. 221, 220 (1979). Such secrecy is justified, in part, because grand juries are themselves a public oversight mechanism; they serve as a "buffer or referee between the Government and the people," *United States v. Williams*, 504 U.S. 36, 47 (1992), and are intended to shield citizens from prosecutorial and judicial overreach. *United States v. Dionisio*, 410 U.S. 1, 17 (1973) (explaining "historic role" of grand jury "as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor"). These unique justifications for secrecy are inapplicable here. Judicial records in the matters at issue concern *ex parte* Government requests for judicial authorization to obtain private electronic communications records. They are not akin to proceedings before a grand jury.

E. Logic Supports a Constitutional Right of Access to Judicial Records in SCA Warrant, PR/TT, and Section 2703(d) Matters Post-Investigation.

What the Government dismisses as mere "policy" arguments in Petitioners' Brief, Gov. Br. 46, demonstrate that the "logic" prong of the *Press-Enterprise II* test is satisfied and that the constitutional presumption of access applies.

Public access to the judicial records at issue would "play[] a significant positive role in the functioning of the criminal justice system, at least at the post-investigation stage," in part because it would "serve[] as a check on the judiciary[,] by enabling the "public [to] ensure that judges are not merely serving as a rubber stamp for the police." *In re Appl. of N.Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 90 (D.D.C. 2008). The Government's claim that this "argument wholly ignores the role of the district court in authorizing surveillance under the relevant statutory authorities" is nonsensical. Gov. Br. 46. Far from "wholly ignor[ing]" it, *id.*, Petitioners argue that access will enable the public to understand the role of the district court. Pet'rs' Br. 37-38. Moreover, public access will aid judicial decisionmaking in such matters by, *inter alia*, "giving magistrate judges additional guidance and reducing their decision-making load." Br. of *Amici* Magistrate Judges 21-22 (explaining that widespread sealing stifles appellate review).

That the judicial records at issue implicate actions of the Executive Branch makes public access even more important. Access will enable the public to understand when and how law enforcement seizes private electronic communications records, including those of journalists and their sources. *See* Br. of Media Organizations as *Amici Curiae* Supporting Appellants 28-31. While the Government suggests that public access is unnecessary because Justice Department policy restricts law enforcement's "ability to monitor members of the press," Gov. Br. 46, it neglects to mention that relevant changes to that policy were put in place in response to public outcry following a series of revelations about the Government's use of these tools, including the Rosen incident, which the public only learned of through the unsealing of SCA warrant materials. Pet'rs' Br. 37-38.

V. The Public Has a First Amendment and a Common Law Right to Inspect Docket Sheets in SCA Warrant, PR/TT, and Section 2703(d) Matters.

Numerous federal courts of appeals have recognized that sealing of docket sheets implicates the public's constitutional and common law rights of access to judicial records. *See* Pet'rs' Br. 59 (collecting cases). The Government limits its discussion of this right to a single sentence and footnote. *See* Gov. Br. 53 n.22, 56. It addresses only one of the cases cited by Petitioners, *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), in which the Eleventh Circuit held that a district court's "maintenance of a dual-docketing system" was "an unconstitutional infringement

on the public and press's qualified rights of access to criminal proceedings." *Id*. at 715. The Government's attempt to dismiss *Valenti* as inapposite on the ground that it "involved criminal cases, not pre-indictment criminal investigative matters, as to which significant law enforcement, public safety, and privacy interests counterbalance the public's interest in transparency" is unavailing. Gov. Br. 53 n.22. Even where judicial records reflected on them are properly sealed, docket sheets themselves typically remain open, for good reasons.

Docket sheets generally do not reflect information of the kind that would threaten any interest sufficient to overcome the public's right of access. *See In re State-Record Co*., *Inc*., 917 F.2d 124, 129 (4th Cir. 1990) (vacating sealing order, explaining that "we can not understand how" public access to "a docket entry sheet could be prejudicial"). The Government offers nothing to support its claim that access to docket sheets in these matters post-investigation would jeopardize "law enforcement, public safety, and privacy interests." Gov. Br. 53 n.22. Nor could it. As noted above, other district courts permit *contemporaneous* public access to dockets sheets reflecting such matters, *supra* p. 4 n.1, and other courts have taken steps to make docket-like information about them available to the public at the time they are filed. Br. of *Amici* Magistrate Judges 9-10. Even the "periodic" reports the District Court ordered below consist of information lifted from docket sheets. Pet'rs' Br. 14-15. Further, docket sheets are not the kind of record that

functions "properly only if kept secret." *Pellegrino*, 380 F.3d at 96. To the contrary, because the ability of the public to assert their rights of access to judicial records would be "merely theoretical if the information provided by docket sheets were inaccessible," *id.* at 93, docket sheets function properly only when open.

CONCLUSION

For the reasons above and in Petitioners' Brief, the Court should reverse the judgment below, hold that the First Amendment and common law presumptions of access apply to judicial records filed in SCA warrant, Section 2703(d), and PR/TT matters, and associated docket sheets, and remand this matter with instructions to evaluate the relief sought pursuant to the correct legal standards.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Fed. R. App. P. 32(a)(2), (7) because it contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2019, I electronically filed the foregoing REPLY BRIEF FOR PETITIONERS-APPELLANTS with the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. All participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

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